

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000650

03/25/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

STATE OF ARIZONA
Appellant

B DON TAYLOR

v.

THOMAS JOSEPH OCONNOR
Appellee

MICHAEL J DEW

PHX CITY MUNICIPAL COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

PHOENIX CITY COURT

Cit. No. #6095844

Charge: 1. DUI/ALCOHOL OR APC
 2. APC/DUI WITH .08 OR HIGHER
 3. EXTREME DUI
 4. LEAVING SCENE OF COLLISION
 5. LEAVING SCENE OF COLLISION

DOB: 08/21/27

DOC: 07/09/02

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Sections 12-124(A) and 13-4032.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000650

03/25/2004

This case has been under advisement since oral argument on February 2, 2004. This Court has considered and reviewed the record of the proceedings from the Phoenix City Court, and the memoranda and oral arguments of counsel.

Appellee, Thomas Joseph O'Connor, was charged in the Phoenix Municipal Court with six charges: (1) Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor, in violation of A.R.S. Section 28-1381(A)(1); (2) Driving with a Blood Alcohol Content in Excess of .08%, a class 1 misdemeanor, in violation of A.R.S. Section 28-1381(A)(2); (3) Extreme DUI, a class 1 misdemeanor in violation of A.R.S. Section 28-1382(A); (4) and (5) Two Counts of Leaving the Scene of an Accident, class 1 misdemeanors in violation of A.R.S. Section 28-662(A); and (6) Failure to Control Speed to Avoid a Collision, a civil traffic violation, in violation of A.R.S. Section 28-701. On November 6, 2002, Appellee O'Connor pled guilty to guilty to Extreme DUI (Count 3) pursuant to the terms of a written plea agreement presented to the court at the time of the entry of the plea. The terms of the plea agreement required that the court sentence Appellee to serve 120 days in jail, but allowed the court to suspend 60 days of the jail time. During sentencing, counsel for Appellee requested that because of Appellee's age and physical condition that he be permitted to serve the 60 day in jail in home arrest.¹ The sentencing judge (the Honorable Richard Garcia, Phoenix City Court Judge) specifically found that Appellee suffered from:

Chronic physical conditions that clearly indicate that it would be a significant risk to his health and condition to be incarcerated.... And it appears under these conditions that apparently you're under some heavy medication also.²

The trial court then ordered:

So under these conditions, the court does find that extraordinary circumstances exists regarding medical condition of the defendant. And that the court does have a court-approved program through Justice Services for monitored health arrest. And that it would be appropriate as a condition of probation under these circumstances.³

Appellant, the State of Arizona, objected to the house arrest. Appellant has filed a timely Notice of Appeal following the trial court's denial of Appellant's Motion to Modify Sentence, which was denied by the trial court.

¹ R.T. of November 6, 2002, at page 7.

² Id. at page 8.

³ Id.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000650

03/25/2004

Appellant argues that “house arrest” is not jail within the meaning of the sentencing statutes of A.R.S. Section 28-1382(F). That statute provides in subsection 1 that a person found guilty of Extreme DUI shall:

...be sentenced to serve not less than 120 days in jail, 60 days of which shall be served consecutively, and is not eligible for probation or suspension of execution of sentence unless the entire sentence has been served (emphasis added).⁴

Appellant argues that “home arrest” is not the equivalent of jail; however, A.R.S. Section 9-499.07 does authorized “home detention programs” or “home arrest” in DUI and Extreme DUI cases where those programs are approved by a board of supervisors or city council for use in DUI cases.⁵ Thus, this Court concludes that “home detention programs” or “home arrest” may substitute as jail within the meaning of the DUI and Extreme DUI statutes, but the Phoenix program for home detention does not appear to have been specifically approved as a DUI home detention program.

Appellee offers a helpful suggestion:

If investigation reveals that Appellee would *not* be accepted by the jail facility because of his health conditions, then the trial court’s creativity should not be disturbed. It was merely premature.⁶

Counsel for the Appellee also notes that “in 27 years of indigent representation in Phoenix Municipal Court, undersigned has had this (defendants not accepted by the jail because of health conditions) occur on more than one occasion.”⁷ Given the realities described by counsel for the Appellee, that the jail facility may refuse individuals for health reasons, then it would appear sound for the trial court to resentence Appellee to the Maricopa County Jail, and to delay the beginning date of that sentence so as to allow counsel for Appellee to provide the Maricopa County Jail not only with a copy of the incarceration order, but copies of Appellee’s medical records, and a list of his medications. Counsel for Appellee could then petition the trial court to modify its order of incarceration in the event that the jail refuses to accept Appellee. At that time some alternative form of incarceration to jail would be appropriate.⁸

⁴ A.R.S. Section 28-1382(F)(1).

⁵ Appellant is also correct that Phoenix has not taken the necessary steps to establish such a home detention program.

⁶ Appellee’s Responsive Memorandum, at page 2.

⁷ Id., at footnote 1.

⁸ Appellant has also requested that this court preclude consideration of “home arrest” time served by the Appellee. Since there is no “home arrest” or “home detention program” properly approved for use by the Phoenix City Court,

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000650

03/25/2004

IT IS THEREORE ORDERED reversing and vacating the sentence imposed in this case.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for resentencing and proceedings consistent with this opinion.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT

credit for "home arrest" time should not qualify as jail time, unless and until the jail refuses to incarcerate Appellee because of his physical health problems.